Filed 4/7/04 In re Shawn M. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re SHAWN M., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. JENNIFER M. et al., Defendants and Appellants.	G032939 (Super. Ct. No. DP006994) O P I N I O N

Appeal from postjudgment orders of the Superior Court of Orange County, Richard E. Behn, Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant Jennifer M.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant Shawn K.

Benjamin P. de Mayo, County Counsel, and Ward Brady, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

Jennifer M. (mother) and Shawn K. (father), parents of now 20-month-old Shawn M., appeal from orders denying their petitions for modification and terminating parental rights. (Welf. & Inst. Code, §§ 366.26, 388; all further statutory references are to the Welfare and Institutions Code unless otherwise indicated.) Both parents contend the court erred by denying their petitions for modification without a full hearing. Father further argues reversal is required because Orange County Social Services Agency (SSA) failed to comply with the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq., ICWA). We disagree and affirm.

FACTS

The child became a dependent of the juvenile court at birth after testing positive for exposure to amphetamines and methamphetamines. At the time, father was incarcerated; both parents have a history of substance abuse. The court terminated family reunification services at the six-month review hearing after determining that the parents failed to substantially comply with their case plans; the court also set a date for the permanency hearing. Father petitioned for relief, and we affirmed the order. (See *Shawn K. v. Superior Court* (Jun. 30, 2003, G032173 [nonpub. opn.]).)

Just before the permanency hearing, both parents filed petitions for modification seeking additional reunification services pursuant to section 388. In the months leading up to the hearing, mother consistently attended weekly monitored visits with the child. Shortly after the six-month review hearing, mother enrolled in an outpatient substance abuse program which included weekly alcohol/drug prevention and

education classes and individual counseling sessions. She began attending Alcoholics Anonymous (AA)/Narcotics Anonymous (NA) meetings and submitted to twice-weekly drug tests with no positive results. Mother enrolled in college classes and planned to move in with relatives residing in another county so the child could be raised in a more suitable environment. Mother asserted modification was in the child's best interests because he would be with his biological family.

In support of his petition, father declared he had completed courses in parenting, substance abuse, anger management, and lifestyle before his release from custody that August. He had attended 15 AA/NA meetings. He had been drug tested in July with a negative result and planned to be tested regularly in the future. Father had obtained employment and expressed his "goal to have stable housing for [himself] and [his] son by November . . . ." Father had visited with the child twice while in prison.

The court denied both petitions without conducting a full hearing. As to mother, the court found her changed circumstances to be "minimal" and "cosmetic" stating, "One AA meeting a week . . . does not show a change of circumstances with regard to her drug history[,] . . . [and] the only thing she has put in her declaration with regard to what's in the best interests of the child is that she's the mom and blood is thicker than water . . . ." As to father, the court found he had shown considerably more changed circumstances, "[a]nd it appear[ed] that he is definitely on the right track." Nonetheless, father had failed to show it would be in the child's best interests to be removed from his current home, particularly since father had no "place to take the child at this point."

In an amended petition filed a few days before the permanency hearing, mother informed the court that she had completed the alcohol/drug education and prevention classes. The court denied the amended petition on its face noting that mother still had not shown that it would be in the child's best interests to be placed with her. During the same proceeding, the court found that the ICWA does not apply. The

permanency hearing subsequently took place several days later. The court terminated parental rights after it found the child likely to be adopted and that adoption and termination of parental rights was in the best interests of the child.

DISCUSSION

Petitions for Modification

Both parents contend the court erred in denying their respective petitions for modification without conducting a full hearing and claim they made the requisite prima facie showing. We are not persuaded.

We first note our disagreement with SSA's contention that mother's appeal is moot because she failed to appeal from the order terminating parental rights. Unlike the cases cited by SSA, we have appellate jurisdiction to modify the order by virtue of father's pending appeal. (See, e.g., *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1316-1317.) Moreover, mother's notice of appeal indicates the appeal is from both the denial of a hearing on her petition for modification and the order terminating parental rights. Under the circumstances, her appeal is not moot.

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition . . . ." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) The requirement of a prima facie showing "is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.]" (*Ibid*.)

Once reunification services are terminated, "the focus of the court's concern shifts from assisting the parent in reunification with the child to securing a stable

new home for the child. [Citation.]" (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609-610.) A prima facie showing of "changing" circumstances is not adequate to justify a hearing when the parent has not shown that the requested modification would be in the child's best interests. (See *id.* at p. 610.)

We agree with the juvenile court's finding that mother's belated efforts to address her substance abuse problem failed to show sufficiently changed circumstances to entitle her to relief. For the first 10 or 11 months of the child's dependency, mother made little effort to reunify with him. She failed to earnestly address her substance abuse problem and did not begin drug testing until after reunification services had been terminated. As to the child's best interests, mother merely asserted it would be better for her son to be raised by her and to know his biological family. While mother's recent attempts to correct the problems that led to the child's dependency are commendable, in light of the child's young age, it is simply a matter of too little too late. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423 [father's seven months of sobriety not new in light of history of drug use]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform"].)

The court found father had demonstrated some change in circumstances and that he had been more diligent than mother in attending classes and attempting to address his substance abuse problem. But father also failed to show how it might be in the child's best interests to modify the court's previous order. He had been out of custody less than a month and had no place to live with the child.

The child was placed in foster care with a potential adoptive family when he was one month old and had since established a loving bond with them. Balancing the child's need for stability and continuity, the court concluded that neither parent had made a prima facie showing that it might be in the child's best interests to grant either petition. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 462-465.) As the court stated, "[t]his

child has only known the family where [he's] at . . . ." Considering the child's young age and the fact he has spent all but the first few weeks of life with his present caretakers, the court did not abuse its discretion by denying the petitions without a full hearing.

Notice Provided Pursuant to the ICWA

Father argues the order terminating parental rights must be reversed because SSA failed to comply with the ICWA's notice requirements. Mother belatedly joins in this contention in her reply brief. We disagree.

Under 25 U.S.C. § 1912(a), "where a state court 'knows or has reason to know' that an Indian child is involved [in a dependency proceeding], statutorily prescribed notice must be given to any tribe with which the child has, or is eligible to have, an affiliation. [Citation.]" (*In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1264.) The ICWA notice provisions, as implemented by rule 1439 of the California Rules of Court, require notice be sent to entities identified as the child's possible tribal affiliations and/or the Secretary of the Interior for the Bureau of Indian Affairs (BIA) "by registered or certified mail with return receipt requested . . . ." (Cal. Rules of Court, rule 1439(f)(1), (3) & (4).) Copies of the notices sent, return receipts, and any correspondence received from the noticed entities should then be filed in the juvenile court. (*In re Marinna J.* (2001) 90 Cal.App.4th 731, 739-740, fn. 4.)

The social worker reported to the court that it had sent notices to BIA and various Cherokee and Choctaw tribes in an effort to determine whether the ICWA applied. Attached to the addendum report filed shortly before the permanency hearing were copies of the notices sent to these entities and correspondence received in return along with the return receipts. The form of notice used sought only to confirm the child's status as an Indian. It listed the names and dates of birth for mother, maternal grandmother, and father, and noted possible Cherokee/Choctaw tribe affiliations for mother and maternal grandmother. The contacted entities either responded that the child

was not registered or enrolled with their tribe or that they could not determine the child's possible Indian heritage from the information provided. The social worker informed the court it had "provided all known information regarding the child's possible Indian heritage, and no other relevant information is known or available at this time." After reviewing these documents, the court found the ICWA did not apply.

Father argues the record is not sufficient to determine what information or notice was actually sent to each entity. To the contrary, it is fairly evident from the social worker's report and the correspondence received in response to the notices sent that the form dated August 21, 2002, was received by each of the entities even though only one copy of the form was submitted to the court.

However, we agree with father that the form utilized by SSA did not fully comply with the ICWA's notice requirements. As one court has noted, the form entitled "'Notice of Involuntary Child Custody Proceedings Involving an Indian Child' (form 'SOC 319')" should be used in lieu of the form entitled "'Request for Confirmation of Child's Status as Indian' (form 'SOC 318')" because the former contains the requisite notice of the proceedings and right to intervene. (*In re Jeffrey A.* (2002) 103 Cal.App.4th 1103, 1108; but see *In re C.D.* (2003) 110 Cal.App.4th 214, 225-226 [concluding neither form was adequate to comply with ICWA notice requirements].) Nevertheless, the error was harmless based on the social worker's assertion that "all known information regarding the child's possible Indian heritage" had been provided to the various entities. (*In re Antoinette S.* (2002) 104 Cal.App.4th 1401, 1413.)

That said, we do not condone SSA's reliance on the wrong form. As we have previously stated, the statutory notice provisions are triggered by the mere suggestion a child may be an Indian child. (*In re Antoinette S., supra,* 104 Cal.App.4th at p. 1407.) However, father's belated speculation that SSA might have been able to obtain and therefore supply additional information does not warrant reversal, since none of the entities contacted by SSA confirmed the child is of Indian heritage based on the available

information. The credibility of the social worker's statement that "all known information regarding the child's possible Indian heritage" had been provided to the various entities was an issue for the juvenile court's determination. By electing not to cross-examine the social worker who prepared the report, the parents agreed to the court's consideration of the information in the report as the only evidence on that issue. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589.) Consequently, father waived the issue by failing to object below. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412.) And based on the evidence in the record, it would be futile to require SSA to repeat the ICWA notice process utilizing the proper form.

DISPOSITION

The postjudgment orders are affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.